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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE STATE OF NEW JERSEY AMICUS CURIAE

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BRIEF FOR THE STATE OF NEW JERSEY AMICUS CURIAE

Statement of Interest of *Amicus*—State of New Jersey

The significant issue raised in this case is whether the exclusionary rule should be modified to admit rele-

vant and competent evidence where the police have acted in good faith in exigent circumstances and application of the rule would serve no valid purpose. Also at issue here is whether a search warrant, which is deficient on its face, may be cured by adducing additional evidence at the suppression hearing to prove that the police in fact had probable cause to obtain the warrant. These questions are of direct and substantial interest to the Attorney General of the State of New Jersey. As the chief law enforcement officer of New Jersey, the Attorney General is concerned with maintaining an equitable balance between law enforcement to protect society against crime and the observation of procedural due process in the administration of criminal justice. In the context of this case, we submit that this balance is best achieved by abrogating the exclusionary rule at least with respect to federal habeas corpus proceedings.

LEGAL ARGUMENT

POINT I

The Fourth Amendment exclusionary rule should be modified or abrogated in favor of more efficacious remedies.

A. Introduction

The exclusionary rule exacts inestimable social cost. Successful motions to suppress eliminate reliable, competent, and relevant evidence. False verdicts result. Truth suffers as notions of "reasonableness" change. Since "truth and justice are inseparable,"[1] justice diminishes

[1] *State* v. *Bisaccia*, 58 N. J. 586, 598, 279 A. 2d 675, 676 (1971).

when relevant evidence is suppressed. The validity of the adversarial system as a means to ascertain truth is demeaned. Loss of public confidence is inevitable. No legal principle which is not constitutionally compelled should reign when its consequences are so harsh. This Court has never held that the Fourth Amendment absolutely requires exclusion of evidence obtained through unreasonable searches and seizures. Clearly, therefore the exclusionary rule is not of constitutional dimension. Rather, this Court has justified application of the rule by relying on an assumption that it deters police misconduct,[2] although several decisions also express concern that judicial integrity might be sullied by use of evidence obtained in violation of the Fourth Amendment.[3] Recent empirical studies indicate that the exclusionary rule does

[2] See, *e.g.*, *United States* v. *Peltier*, —— U. S. ——, 95 S. Ct. 2313, 2316 (1975); *United States* v. *Calandra*, 414 U. S. 338, 343 (1974); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 231-32 (1973); *Williams* v. *United States*, 401 U. S. 646, 654-55 (1971); *Davis* v. *Mississippi*, 394 U. S. 721, 723 (1969); *Desist* v. *United States*, 394 U. S. 244, 246 (1969); *Fuller* v. *Alaska*, 393 U. S. 80, 81 (1969); *Lee* v. *Florida*, 392 U. S. 378, 381 (1968); *Linkletter* v. *Walker*, 381 U. S. 618 635-37 (1965). See also *e.g.*, Gibbons, "Practical Prophlaxis and Appellate Methodology: the Exclusionary Rule as a Case Study in the Decisional Process," 3 *Seton Hall L. Rev.* 295, 298 (1972); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 *U. Chi. L. Rev.* 665, 668-72 (1970).

[3] See, *e.g.*, *United States* v. *Peltier*, *supra*, 95 S. Ct. at 2317; *Linkletter* v. *Walker*, *supra*, 381 U. S. at 638; *Mapp* v. *Ohio*, 367 U. S. 643, 659 (1961); *Elkins* v. *United States*, 364 U. S. 206, 223 (1960); *Olmstead* v. *United States*, 277 U. S. 438, 483-84 (1928), (Brandeis, J., dissenting). See also, *e.g.*, Note, "The Fourth Amendment Exclusionary Rule: Past, Present, No Future," 12 *Am. Crim. L. Rev.* 507, 510-11 (1975).

not serve to further either of these goals.[4] Consequently, the rule should be abrogated or modified in favor of a more effective remedy which balances the rights of individuals with those of the general citizenry.

B. The Fourth Amendment Exclusionary Rule is a Judge-Made Device Without Basis in Constitutional History And Without Precedential Logic or Rational Effect.

At common law, courts declined to examine the method by which evidence was obtained.[5] Evidence was judged for competence, materiality, and relevance, not for the manner on which it was obtained.[6] Moreover, the modern law of searches and seizures dates only to the Eighteenth Century. As this Court has noted,[7] John Wilkes' case and its contemporary companions mark the initial judicial recognition of a right to be free from unreasonable searches and seizures.[8]

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[4] Oaks, *supra*, 37 *U. Chi. L. Rev.* at 754-57; Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives," 2 *J. Legal Studies* 243, 275-78 (1973). See also, *e.g.*, La Fave, *Arrest: The Decision to Take the Suspect Into Custody*, (1972), at 222; Skolnick, *Justice Without Trial*, (1967) at pp. 215-28.

[5] *E.g.*, *Olmstead* v. *United States*, *supra*; *Weeks* v. *United States*, 233 U. S. 343 (1914); *Boyd* v. *United States*, 116 U. S. 616 (1886); See, *e.g.*, *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585 (1926).

[6] *Id.*

[7] *E.g.*, *Boyd* v. *United States*, *supra*.

[8] *Leach* v. *Three of the Kings Messengers*, 16 *How. St. Tr.* 1001 (1765); *Entick* v. *Carrington*, 19 *How. St. Tr.* 1029 (1765); *Huckle* v. *Money*, 95 *Eng. Rep.* 768 (1763); *Wilkes* v. *Wood*, 19 *How. St. Tr.* 1153 (1763). See generally Lasson, *History and Development of the Fourth Amendment to the United States Constitution* (1937) pp. 35-45. See also Bailyn, *The Ideological Origins of the American Revolution* (paper ed. 1973) at 110-14.

Wilkes, of course, anonymously published the anti-Ministry *North Briton*. Lord Halifax, then Prime Minister, issued general warrants to four royal messengers to discover the identity of the publisher.[9] They eventually discovered Wilkes' role and ransacked his house, seizing various items. Wilkes was imprisoned in the Tower for seditious libel.[10] He, and others at his urging, sued the messengers in trespass and recovered.[11] On appeal, Lord Camden upheld the damage verdicts. These decisions, although critical of general warrants, intimate no right to exclusion of evidence. Wilkes himself was freed, not by asserting his rights in a criminal defense, but by claiming Parliamentary privilege in habeas corpus.[12] Nothing in this seminal period suggests that exclusion could substitute for trespass.

Much of the early American resentment against unreasonable searches and seizures emanates from royal officials' increasing reliance on general warrants and writs of assistance to enforce unpopular Parliamentary regulations of colonial trade.[13] It was against these executive warrants that James Otis so eloquently orated.[14]

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[9] Lasson, *supra*, at pp. 44-45.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 50-78. See also, *e.g.*, Aptheker, *The American Revolution* (1960) at Ch. 2; Bailyn, *supra*, at 118; 1 Boorstin, *The Americans: The Colonial Experience* (Prepared 1958) at 345-73; Few modern works though, catch the spirit of the times as well as John Dickinson's Letters from a Farmer in Pennsylvania.

[14] 2 Adams, *Works* 523-25; 10 *Id. passim*; Quincy, *Reports*, 395-540 (App. I) (1865)

The opposition, though, focused on royal abuses and not on local law enforcement.

It is historically obvious that general warrants and writs of assistance were the continued focus of American restrictions on national government. Prohibitions against such devices were contained in the body of the Constitution, while the express freedom from unreasonable searches and seizures was appended thereafter.[15] Again, the concern was directed at national and not local government. For example, New Jersey's original 1776 Constitution contained no similar guarantee.[16] These matters, after Parliamentary repeal of the general warrant statutes,[17] were hardly of vital concern. Taxes and other significant oppressive measures, not searches, directly sparked the Revolution.[18] Moreover, notions of evidentiary exclusion are utterly absent from early constitutional history.

Indeed, almost a century passed from ratification of the Constitution until this Court decided that exclusion of evidence might be used as a remedy for governmental illegality. *Boyd* v. *United States,* 116 U. S. 616 (1886). Furthermore, *Boyd* created the remedy only by com-

[15] *U. S. Const.,* Amend IV. See Annals of Cong. 754 *et seq.* (June 8, 1789) (remarks of Reps. Gerry and Benson).

[16] No such prohibition appeared until the 1844 New Jersey Constitution was promulgated.

[17] 13 and 14 *Car.* II, c. 11, §5 (1663); See 16 Hansard, Parliamentary Debates (1765). See generally Lasson, *supra,* chs, 1, 2. But see Morris, ed., The Era of the American Revolution (1939) at 40-75 (Dickerson, "Writs of Assistance as a Cause of Revolution").

[18] See sources cited note 13, *supra.*

mingling the foundations of the Fourth with those of the Fifth Amendment. See 116 U. S. at 621, 630-33. In fact, the case involved neither a search nor a seizure. Rather, it concerned a customs statute which sanctioned non-production of documents by confession of the government's allegations. *Id.* at 620. Only Justice Miller, joined by Chief Justice Waite, protested Justice Bradley's imperfect analysis. *Id.* at 638-41. Subsequent historical scholarship has validated Justice Miller's concurring opinion, demonstrating that the Fourth and Fifth Amendments derive from separate and distinct sources and are directed at different official evils.[19] Nevertheless, this Court has occasionally reverted to such dualistic analysis to apply the exclusionary rule. *E.g., Schmerber* v. *California,* 384 U. S. 757, 767 (1966); *Rochin* v. *California,* 342 U. S. 165 (1952). Yet, no decision holds that the Fourth Amendment *alone* requires exclusion of evidence. As previously noted, the exclusionary rule is entirely a judicially fashioned device not of constitutional stature. Only by compounding *Boyd's* fallacious conception of the relationship between the Fourth and Fifth Amendments can the exclusionary rule even be said to be constitutionaly derived, though not required.

[19] See Lasson, *supra,* at 15 et seq.; Taylor, *Two Studies in Constitutional Interpretation* (1969); 3 Wigmore, *Evidence* (3d ed. 1940), §§817 to 820d at 291-308. See also Amsterdam, *General Perspectives on the Fourth Amendment,* 58 *Minn. L. Rev.* 349, 378, 456 at n. 269 (1974). *Contra,* Schrock and Welsh, "Up from Calandra." "The Exclusionary Rule as a Constitutional Requirement," 59 *Minn. L. Rev.* 251 (1974). See Levy, *Origins of the Fifth Amendment* (1968), 325-332. For older commentary, See Black, Constitutional Law 435-42 (1893); Cooley, Constitutional Limitation 299-308 (1868); Chancellor Kent however failed to mention any such freedoms. See Kent, 1 Commentaries 1-*37.

In fact, *Boyd's* faulty reasoning was the precise basis of the rule's eventual promulgation. *Weeks* v. *United States,* 232 U. S. 383 (1916). *Weeks* relied heavily on *Boyd* for its conclusion that an excision of evidence on Fourth Amendment grounds could ever be proper. 232 U. S. at 386-88. Moreover, much of the *Weeks* decision relates to conceptions of warrantless searches, seizures, and arrests which are now obsolete.[20] Additionally, the focus of the decision is delineated in terms of the evils of proprietary dispossession. See 232 U. S. at 393-98. These property concepts have been abandoned to a great extent. See, *e.g., Katz* v. *United States,* 389 U. S. 347 (1967); *Jones* v. *United States,* 362 U. S. 257 (1960). Clearly, an analysis which contemplates total appropriation of property without due process is logically irrelevant to situations where property is taken solely for evidentiary purposes. This type of analysis further beclouded the exclusionary rule's foundation. So here, too, is another flaw in the rule's predicate. Its only precedential and historical bases are obviously undifferentiated mixtures of the law of other Amendments. The rule's only real justification, now discredited, was prophylaxis against police conduct.[21]

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[20] Compare 232 U. S. at 389 with *United States* v. *Wallace & Tiernan Co.,* 336 U. S. 796, 796-97 (1949).

[21] See, *e.g., Elkins* v. *United States,* 364 U. S. 206, 208 (1960) (end of "silver platter" doctrine); *United States* v. *Lustig,* 338 U. S. 74, 79 (1949); *Feldman* v. *United States,* 322 U. S. 487, 492 (1944); *Gambino* v. *United States,* 273 U. S. 310 (1928); *Byars* v. *United States,* 273 U. S. 28 (1927). See generally, *e.g.,* Burrett, *"Personal Rights, Property Rights and the Fourth Amendment,"* 1960 *Sup. Ct. Rev.* 46, 55; Paulsen, *The Exclusionary Rule and Misconduct By the Police,* 52 *J. Crim. L., C., and P. S.* 255 (1961).

Subsequent to *Weeks,* the Court continued to allow evidence illegally seized by state officials to be used in federal courts,[22] and by federal officers in state courts.[23] A constitutional right to exclusion would have required exclusion under either circumstances. When the situations were finally "rectified", deterrence of official misconduct and systemic integrity once more were the rationales.[24]

Likewise, adherence to property concepts, not fully disavowed until *Katz, supra,*[25] created a maze of decisions concerning electronic surveillance.[26] That problem was not fully solved by court decisions, and a proliferation of state and federal statutes was necessary to bring order to the area.[27] The same proprietary concepts have also

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[22] See *Elkins* v. *United States, supra.*

[23] *Id.*

[24] *Id.*

[25] But see *Air Pollution Variance Board* v. *Western Alfalfa Corp.,* 416 U. S. 861 (1974); discussed in Note, *"Air Pollution Variance Board* v. *Western Alfalfa:* Constitutional limits on Enforcement of Air Pollution Laws," 5 *Environmental L. Rev.* 142 (1974).

[26] *E.g., Lee* v. *Florida,* 392 U. S. 378 (1968); *Berger* v. *New York,* 388 U. S. 41 (1967); *Lanza* v. *New York,* 370 U. S. 139 (1962); *Clinton* v. *Virginia,* 377 U.S. 158 (1964); *Silverman* v. *United States,* 365 U. S. 505 (1961); *On Lee* v. *United States,* 343 U. S. 747 (1955); *Goldman* v. *United States,* 316 U. S. 129 (1942); *Olmstead* v. *United States, supra.*

[27] 18 U.S.C. §§2510-20; *E.g., N. J. Stat. Ann.* Secs. 2A:156A-1 to 26. See generally, *e.g.,* Note, *"New Jersey Electronic Surveillance Act", 26 Rutgers L. Rev.* 617 (1973); Note, *"Wiretapping and Electronic Surveillance"* (Title III of the Crime Control Act of 1968), 23 *Rutgers L. Rev.* 319, 378-79 (1969). See also *United States* v. *United States District Court,* E. D. Mich. S. D. 407 U. S. 297 (1972).

produced an incredibly confused body of "standing" law, which remains unsettled.[28] Many of these decisions seem to be more result-oriented than a staunch commitment to the exclusionary rule otherwise might demand.[29] If evidence is obtained through official insolence, judicial integrity is stained whether the evidence is used against the conduct's victim or against another.[30] Moreover, illegally seized evidence may be used to impeach the credibility of a defendant.[31] Again, the integrity of the system theoretically suffers. The only principle that could justify this latter anomaly is that two wrongs do make

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[28] See, *e.g.*, *Brown* v. *United States*, 411 U. S. 223 (1973); *Alderman* v. *United States*, 394 U. S. 165, (1969); *Simmons* v. *United States*, 390 U. S. 377 (1968); *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Jones* v. *United States*, 362 U. S. 257 (1960); *United States* v. *Jeffers*, 342 U. S. 48 (1951); *Goldstein* v. *United States*, 316 U. S. 114 (1942); *New York ex rel. Hatch* v. *Reardon*, 204 U. S. 152 (1907). See generally, *e.g.*, Gutterman, "A Person Aggrieved-Standing to Suppress Illegally Seized Evidence in Transition," 23 *Emory L. Rev.* 111 (1974). See also Sedler, "Standing to Assert Constitutional Jus Tertii in the Supreme Court," 71 *Yale L. J.* 559 (1962); Note, "Standing to Assert Constitutional Jus Tertii," 88 *Harv. L. Rev.* 423 (1974).

[29] *E.g.* Compare *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391-92 (1920) with cases cited Note 28 *supra*. It should be noted that Alderman, *supra*, involved a "national security" type fact pattern. *Cf. Abel* v. *United States*, 362 U. S. 217 (1959).

[30] *Silverthorne Lumber Co.* v. *United States*, *supra*. See *Linkletter* v. *Walker*, *supra*; *Elkins* v. *United States*, *supra*. Of course the same might be true of other constitutional rights, but the concern here is only the Fourth Amendment.

[31] *United States* v. *Calandra*, 414 U. S. 338 (1974); *Harris* v. *New York*, 400 U. S. 222 (1971); *Walder* v. *United States*, 353 U. S. 62 (1954).

a right. Consequently, diminution of the judicial integrity justification is evident from court decisions. There is no need for reference to empirical studies in this respect. Regardless, the lack of any cohesive approach to the rule is a clear expression of this Court's own doubts of exclusion as a viable remedy.

Furthermore, for almost fifty years this Court recognized that different problems confront state and federal law enforcement officials. The Court initially refused to force the states to apply the exclusionary rule even though it found the Fourth Amendment enforceable through the due process clause of the Fourteenth. *Wolf* v. *Colorado*, 338 U. S. 25 (1949). The Court also forbade federal courts to intervene in state proceedings to suppress evidence. *Stefanelli* v. *Minard*, 342 U. S. 117, 120 (1954). That prohibition still controls. *Cf.*, *Kugler* v. *Helfant*, 421 U. S. 117 (1975).[32]

Each of these decisions emphasizes the non-Constitutional nature of the rule. Only when the Court foisted the rule upon the States did it deem the remedy a Constitutional requirement of any sort. *Mapp* v. *Ohio*, 367 U. S. 643, 657 (1961). Even so, the Court did not establish the rule as derived solely from the Fourth Amendment. Rather, the Court found it to derive from the due process clause of the Fourteenth Amendment. 367 U. S. at 656-57. Further, even in *Mapp* the Court seemed to recognize that exclusion was nothing more than a rule of evidence. 367 U. S. at 648-49. *Mapp* thus departed from long accepted notions of the rule's function and nature. Of course,

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[32] If comity constraints are applicable in these types of cases, then surely they should support overruling at least of *Mapp* v. *Ohio*, *Cf.*, *e.g.*, *Steffel* v. *Thompson*, 415 U. S. 452 (1974). *Perez* v. *Ledesma*, 401 U. S. 82 (1971); *Samuels* v. *Mackel*, 401 U. S. 66 (1971); *Younger* v. *Harris*, 401 U. S. 37 (1971).

for the Court to have found the rule binding on the States, it necessarily established a constitutional basis therefor.[33] The radical departure from earlier case law is easily explained by the result. The ends seem to have been perceived to have justified the means. Otherwise, *Mapp* is a logical travesty which ignores the fallacies of its predecessors and which uses earlier cases to reach a result which in no way follows from the precedents. See 367 U. S. 657 at n. 8. Regardless, the case did not actually establish either a right to exclusion or elevate the exclusionary rule itself to constitutional stature. In fact, the constitutional basis of the rule is the right to be free from unreasonable searches and seizures, while the rule itself has been denominated as the "only effective way" to implement that right. 367 U. S. at 656 citing *Elkins* v. *United States,* 364 U. S. 206, 217 (1960). This assumption was unsupported then and is now discredited. The rule is neither effective nor does it implement the right. Moreover, this somewhat blithe assertion effected unnecessary disequilibrium in the relationship between the states and the federal government.[34]

However, the Court declined to apply the rule retroactively. *Linkletter* v. *Walker,* 381 U. S. 618 (1965). Consequently, its stature as a Constitutional remedy once more became questionable.[35] *Mapp,* then, is the only con-

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[33] See, *e.g., Adamson* v. *California,* 332 U. S. 46 (1947); *Palko* v. *Connecticut,* 302 U. S. 319 (1937); *Twining* v. *New Jersey,* 211 U. S. 78 (1908); *Hurtado* v. *California,* 110 U. S. 516 (1884).

[34] See note 32 *supra* and accompanying text.

[35] Compare, *e.g., Michigan* v. *Tucker,* 417 U. S. 433 (1974); *Frazier* v. *Cupp,* 394 U. S. 731 (1969); *Johnson* v. *New Jersey,* 384 U. S. 719 (1966); *Tehan* v. *United States ex rel. Schott,* 382 U. S. 406 (1966).

temporary case which recognizes a constitutional basis for the exclusionary rule, stemming as much from the Fourteenth Amendment due process clause as from the Fourth Amendment.

C. The Exclusionary Rule Has Raised Insurmountable Obstacles To Good Faith Police Performance.

Concomitant with the foregoing procedural oddities attendent to the exclusionary rule is its substantive confusion. All warrantless searches are *per se* unreasonable except those within "well" delineated exceptions. Those exceptions, though, are fast devouring the rule. For example, searches incident to lawful arrests have always been legal, but their scope has widened and narrowed so frequently and so drastically that no policeman could realistically either rely on or be deterred by judicial expositions.[36] Likewise, the law relevant to the permissible scope of automobile searches may possibly permit searches of vehicles if the officer could arrest the occupants for traffic violations, even if he does not arrest them, and even if he

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[36] *E.g., Vale* v. *Louisiana,* 399 U. S. 30 (1970); *Shipley* v. *California,* 395 U. S. 818 (1969); *Chimel* v. *California,* 395 U. S. 752 (1969); *McCray* v. *Illinois,* 386 U. S. 300 (1967); *Beck* v. *Ohio,* 379 U. S. 89 (1964); *Preston* v. *United States,* 376 U. S. 364 (1964); *Rios* v. *United States,* 364 U. S. 253 (1960); *United States* v. *Rabinowitz,* 339 U. S. 56 (1950); *Brinegar* v. *United States,* 338 U. S. 150 (1948); *Trupiano* v. *United States,* 334 U. S. 699 (1947); *Harris* v. *United States,* 331 U. S. 145 (1947); *United States* v. *Lefkowitz,* 285 U. S. 452 (1932); *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344 (1935); *Marron* v. *United States* 275 U. S. 192 (1927); *Carroll* v. *United States,* 267 U. S. 132 (1925).

is unaware that he might.[37] Warrantless searches in "exigent circumstances" are also permitted, but appellate courts' changing notions of emergency cannot be said to comport with those of a working policeman in increasing fear for his safety.[38] The permissibility of warrantless administrative searches has also fluctuated.[39]

Moreover, there is a whole range of police conduct which the Fourth Amendment, and thus the exclusionary rule, does not reach. This conduct is termed "investigative detention" which may be accompanied by a "non-search" pat-down.[40] Between this conduct and the arrest

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[37] *E.g., Cardwell* v. *Lewis,* 417 U. S. 583 (1974); *Gustafson* v. *Florida,* 414 U. S. 260 (1974); *Cady* v. *Dombrowski,* 413 U. S. 433 (1973); *Chambers* v. *Maroney,* 399 U. S. 51 (1970); *Cooper* v. *California,* 386 U. S. 58 (1967); *United States* v. *DiRe,* 332 U. S. 581 (1948); *Carroll* v. *United States,* 267 U. S. 132 (1925); See *Weeks, supra.*

[38] *E.g., Warden* v. *Hayden,* 387 U. S. 294 (1967); *Chapman* v. *United States,* 365 U. S. 610 (1948). See also *Gilbert* v. *California,* 385 U. S. 263, 269 (1967) ("hot pursuit").

[39] *E.g., United States* v. *Biswell,* 406 U. S. 311 (1972); *Colonade Catering Corp.* v. *United States,* 397 U. S. 72 (1970); *Camara* v. *Municipal Court,* 387 U. S. 523 (1967); *See* v. *City of Seattle,* 387 U. S. 523 (1967); See *United States* v. *Wallace & Tiernan Co.,* 336 U. S. 793 (1949); *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186 (1946); See also *Nathanson* v. *United States,* 290 U. S. 41 (1933); *Silverthorne Lumber Co.* v. *United States, supra.*

[40] *E.g., Adams* v. *Williams,* 407 U. S. 143 (1972); *Recznick* v. *City of Lorain,* 393 U. S. 166 (1968); *Sibron* v. *New York,* 392 U. S. 40 (1968); *Terry* v. *Ohio,* 392 U. S. 1 (1968). Likewise, a man's voice and his handwriting samples are not subjects of "seizures" when he is compelled to "present" either to a grand jury. *United States* v. *Nara,* 410 U. S. 19 (1973) (handwriting); *United States* v. *Dionisio,* 410 U. S. 1 (1973) (voice).

or exigent exceptions lies the *de facto* arrest, which may permit a warrantless search.[41] It is difficult for Constitutional scholars as well as policemen to definitively label any given law enforcement procedure within this range.[42] Surely a policeman would be hard pressed to explain the precise nature of his conduct in terms of the foregoing framework.

This Court has also attempted to delineate other forms of non-search conduct. Items in "plain view" are not the subject of searches.[43] Likewise, trespass *ab initio* in the "open fields" will not vitiate admission into evidence of objects seized as the result of observations made.[44] Nor are abandoned objects, *"bona vacantia,"* the subject of

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[41] *E.g., Cupp* v. *Murphy,* 412 U. S. 291 (1974); *Rios* v. *United States,* 364 U. S. 253 (1960); *Henry* v. *United States,* 361 U. S. 98 (1959).

[42] See generally, Amsterdam, *supra,* 58 *Minn. L. Rev.* at 386-92.

[43] *E.g., Harris* v. *New York,* 390 U. S. 234, 236 (1967).

[44] *E.g., Air Pollution Variance Board* v. *Western Alfalfa Corp., supra. Hester* v. *United States,* 265 U. S. 57 (1924). Yet, some courts have found that there is a difference between "open fields" and "curtilage", creating even more confusion. See, *e.g., Patler* v. *Slayton,* 503 F. 2d 472 (4 Cir. 1974); *U. S. ex rel. Saiken* v. *Bensinger,* 489 F. 2d 865 (7 Cir. 1973); *United States* v. *Broon,* 473 F. 2d 952 (5 Cir. 1973); *United States* v. *Haywood,* 464 F. 2d 756 (D. C. Cir. 1972); *United States* v. *Capps,* 435 F. 2d 136 (9 Cir. 1970); *Fulbright* v. *United States,* 392 F. 2d 432 (10 Cir. 1968); *McDowell* v. *United States,* 383 F. 2d 599 (8 Cir. 1967); *Roseneranz* v. *United States,* 356 F. 2d 310 (1 Cir. 1966); *United States* v. *Whitmore,* 345 F. 2d 28 (6 Cir. 1965); *United States* v. *Romano,* 330 F. 2d 566 (2 Cir. 1964).

either search or seizure.[45] Consent searches have also undergone incredible permutations.[46]

Most importantly, and most frequently, underlying notions of probable cause have changed.[47] The Court often substitutes a syllogism for a policeman's initiative actions based on his expertise. Yet, the Court has never recognized that to some extent, an on-the-spot determination of probable cause is as much an expert opinion as testimony given concerning an autopsy. Once more, the concepts change so rapidly and so drastically that police reliance, by necessity, must be *de minimis*. Court decisions must be said to foster as much misconduct as they deter.[48] In any case, much of the "misconduct" is deemed so only *ex post facto* and as the result of doctrinal change.[49]

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[45] *Abel* v. *United States, supra.*

[46] *E.g., Schneckloth* v. *Bustamonte, supra; Lee* v. *Florida, supra; Osborn* v. *United States,* 385 U. S. 323 (1966); *Stoner* v. *California,* 376 U. S. 483 (1904); *Chapman* v. *United States,* 365 U. S. 610 (1961); *United States* v. *DiRe,* 332 U. S. 581 (1948); *Zap* v. *United States,* 328 U. S. 624 (1966); *Davis* v. *United States,* 328 U. S. 582 (1946).

[47] See, *e.g., Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971); *United States* v. *Harris,* 403 U. S. 573 (1971); *Davis* v. *Mississippi,* 394 U. S. 721 (1969); *Recznik* v. *City of Lorain, supra; Sibron* v. *New York, supra; Terry* v. *Ohio, supra; United States* v. *Ventresca,* 380 U. S. 102 (1965); *Rios* v. *United States, supra; Draper* v. *United States,* 358 U. S. 307(1959); *Brinegar* v. *United States, supra.*

[48] See, *e.g., Oaks, supra; Spiotto, supra.*

[49] See, *e.g., United States* v. *Peltier, supra; Williams* v. *United States,* 401 U. S. 646 (1971); *Schmerber* v. *California,* 384 U. S. 757 (1966); *Linkletter* v. *Walker, supra; Elkins* v. *United States, supra; Irvine* v. *California,* 347 U. S. 128 (1954); *Wolf* v. *Colorado, supra.*

Although the requirements for obtaining warrants has remained relatively constant,[50] these criteria have changed with sufficient frequency to obscure requirements concerning informant reliability and factual basis.[51] Again, police confusion is the only discernible result. The proliferation of doctrines concerning the Fourth Amendment, which in no way can be said to realistically affect routine police performance also perverts judicial integrity.

D. Systemic Integrity is Destroyed by the Exclusionary Rule.

There is no right to break the law.[52] Nor is there a right to avoid detection.[53] The Fourth Amendment exclusionary rule contravenes both of these basic tenents. In effect, it tends at least to establish a right to avoid detection. This is an incentive to break the law. So, rather than being an extraordinary remedy of infrequent use, the exclusionary rule has fostered crime. Criminals, especially recidivists, appear to be well aware that any criminal activity, even when discovered, may well go unpun-

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[50] See, *e.g., Coolidge* v. *New Hampshire, supra; Davis* v. *Mississippi, supra; Spinelli* v. *United States,* 393 U. S. 410 (1965); *Aguilar* v. *Texas,* 378 U. S. 108 (1964); *Chapman* v. *United States, supra; Giordanello* v. *United States,* 357 U. S. 480 (1958); *Johnson* v. *United States,* 333 U. S. 10 (1948); *Nathanson* v. *United States,* 290 U. S. 41 (1933); *Agnello* v. *United States,* 269 U. S. 20 (1925).

[51] See, *e.g., Spinelli* v. *United States, supra; United States* v. *Ventresca, supra; Aguilar* v. *Texas, supra; Nathanson* v. *United States, supra.*

[52] See, *e.g., Walker* v. *Birmingham,* 388 U. S. 307 (1967).

[53] See, *e.g.,* 18 U.S.C. §§921, 922, 1071 to 1074 (flight statutes).

ished.[54] This cannot be considered maintenance of "judicial integrity." "A deliberately false verdict debases the judicial process." *State* v. *Bisaccia,* 58 N. J. 586, 589, 279 A. 2d 675, 676 (1971).

Moreover, society's most basic assurance to its members, and its most cogent abstract existential justification is the protection of its members. "Primarily, governments exist for the maintenance of social order." *Chicago* v. *Sturges,* 222 U. S. 313, 322 (1911). Indeed, "[t]he first right of the individual is to be protected from criminal attack. The Bill of Rights was not intended to deny that primary mission." *State* v. *Bisaccia,* 58 N. J. at 540, 279 A. 2d *supra* at 677. Liberty, to some extent is surrendered by the very formation of society. Even so, democratic society protects freedom as well as assuring security. In return, it asks only for co-operation in the enforcement of its laws. If a policeman has broken the law, he should be punished. But society need not leave itself so unprotected as the exclusionary rule now requires.

Once, these arguments might have met with objection on the grounds that police conduct, at its most arrogant, was based upon a citizen's race, economic class, or political views.[55] Now, though, one need only look about. Attitudes toward people are changing, as is the composition of the police force. The exclusionary rule has outlived its usefulness, if ever it had any utility.

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[54] See *Spiotto, supra,* at 255-59.

[55] See Amsterdam, *supra,* 58 *Minn. L. Rev.* at 394-95.

In view, of new realities, the judicial system protests its virtue too much. Indeed, if policemen injure themselves to uphold their conduct, the system's integrity has suffered whether or not the conduct is upheld. First, it fosters criminal activity. Second, the police response may be equally criminal. Third, it produces perjury. No system of justice can claim integrity when it creates such disfunctional conflict. In addition,

> [We] must be mindful that the contest is not between the State and the individual. The contest is wholly between competing rights of the individual—the right to be protected from criminal attack and the several rights in the Amendments. When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, *Mapp* denies the innocent the protection due them.
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> But *Mapp* as applied calls for suppression whenever a search is found to violate the Amendment, even by a bare majority of a court, and notwithstanding that the policeman and the magistrate acted without a trace of insolence. *State* v. *Bisaccia, supra,* 58 N. J. at 590, 279 A. 2d at 677.

If insolence is to be deterred, other remedies can be effected.

Nonetheless, in some cases the egregiousness of the police conduct may still demand suppression of evidence. However, there is no reason that such conduct be de-

fined as "unreasonable" on the basis of current standards. Other parameters exist, such as bad faith, or intrusion disproportionate to the protection needed, while basic notions of due process would continue to assure the integrity of the judicial systems in extreme cases of official misconduct.[56]

Of these possibilities, in addition to strong civil remedies, *amicus curiae* respectfully submits that Fourth Amendment rights can be protected adequately by judging searches and seizures according to the good faith of the officers involved. Bad faith police conduct would still not preclude suppression of evidence. However, good faith police conduct need not be penalized. An operative definition of good faith should involve two components. First, whether the conduct under judicial scrutiny was obviously designed to effectuate legitimate police functions or was designed to harrass a "victim." Second, whether the officers themselves honestly believed that their search would disclose evidence of a crime. Honest belief and effectuation of legitimate police functions are

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[56] See, *e.g.*, *Schmerber* v. *California, supra; Breithaupt* v. *Abram*, 352 U. S. 432 (1957); *Irvine* v. *California, supra; Rockin* v. *California, supra; Wolf* v. *Colorado, supra;* A.L.I. *Model Code of Pre-Arraignment Procedure*, Official Draft No. 1, §290.2 (2). See generally, Delinger, "Of Rights and Remedies; The Constitution As a Sword", 85 *Harv. L. Rev.* 532 (1972). Friendly, "The Bill Of Rights As a Code of Criminal Procedure"; 53 *Calif. L. Rev.* 929, 953 (1965). Levin, "An Alternative to The Exclusionary Rule For Fourth Amendment Violation," 55 *Judic.* 74, 75-76 (1974). Wright, "Must the Criminal Go Free If the Constable Banders?" 50 *Texas L. Rev.* 736, 741-45 (1972). See also Gray, "The Admissibility of Evidence Illegally Obtained In Scotland," 1966 *Judicial Rev.* 89; Hardin, "Other Answers: Search and

(Footnote continued on following page)

more than sufficient to assure that the police will not sully the integrity of the judicial system by arrogant or insolent action. Likewise, such a standard would eliminate the somewhat anomalous *ex post facto* "probable cause" determination of a trial judge who cannot fathom those indescribable, unquantifiable instincts which a working policeman must develop in order to survive "on the streets." Official insolence would be deterred and the integrity of the judicial system assured, but the guilty would have no escape either because of mere negligence or due to differing interpretations of "exigent circumstances" and "probable cause."

It may well be difficult to posit a policeman's good faith behavior as unreasonable under any circumstances. Yet, this is the end result of any successful invocation of the exclusionary rule. Any of the substitutions suggested immediately above would be preferable. Perhaps it might be argued that these standards substitute subjective for objective analysis. But, in view of current judicial determinations of probable cause *vel non*, subjectivity is already present in Fourth Amendment law. Actually, any parameters to some extent must be said to be subjective. It should be evident that "reasonableness" and "good faith" can be intimately related. This relationship could be more fully developed if Fourth Amendment determinations were made in a civil rather than a criminal context, and if "good faith" sufficed for the prosecution to withstand a motion to suppress.

(Footnote continued from preceding page)

Seizure, Coerced Confession and Criminal Trial in Scotland, 113 *U. Pa. L. Rev.* 165 (1964); Note, "The Exclusionary Rule," *supra*, 12 *Am. Crim. L. Rev.* at 524-36; Note, "Use of §1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards", 5 *Harv. Civ. Rts. L. Rev.* 64 (1970); Note, "The Federal Injunction As A Remedy For Unconstitutional Police Conduct," 75 *Yale L.J.* 143 (1968).

E. Civil Remedies Are A Satisfactory Alternative To The Fourth Amendment Exclusionary Rule.

The exclusionary rule has failed to protect any legitimate rights. Law generally protects rights by assessing damages for invasions to those rights. The exclusionary rule simply does not do this. It protects only those who have transgressed criminal laws. It is a truism that the guilty go free and the innocent are generally left unprotected. This is an inversion of the goals which law is designed to achieve. Better the innocent should be protected. The establishment of strong civil remedial procedures will insure that the innocent will be protected, the guilty punished, and the Fourth Amendment more pervasively effectuated.

This Court has already held that Fourth Amendment rights may be the basis of recovery in tort suits against federal officers. *Bivens* v. *Six Unknown Narcotics Agents,* 403 U. S. 388 (1971).[57] Likewise, New Jersey has recently re-emphasized the efficacy of such remedies. *Cashen* v. *Spann,* 66 N. J. 541, 334 A. 2d 8 (1975). These remedies establish viable means for assertion of rights against truly unreasonable governmental intrusions. Theoretically, the guilty as well as the innocent may recover. But the guilty would also receive just deserts. Moreover, civil damage suits would not be the exclusive mode of redress. Police departments would of necessity become more responsive to citizens' complaints.[58] Disciplinary action could be taken, from mild reprimands to expulsion or imposition of criminal sanctions, depending on the

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[57] See 28 U.S.C. §1343 (3); 42 U.S.C. §1983; *Monroe* v. *Pape,* 365 U. S. 167 (1961). See also *Lynch* v. *Household Finance Corp.,* 405 U. S. 538 (1972).

[58] See, *e.g., Burger,* "Who Will Watch the Watchmen?" 14 *Am. U. L. Rev.* 1 (1964).

character of the conduct.[59] Finally, an exclusionary rule would still exist, but its purview would extend only to cases of bad faith police conduct.

In any event, enforcement of the Fourth Amendment would reside more directly in the People. By placing the ultimate responsibility for enforcement at the local level, political pressure could more easily influence offensive police practices. From its adoption to 1961, the Fourth Amendment had been directed only against federal abuses. Return of the means of its vindication to the States, and ultimately to the People, would be consistent with its objectives. Local community democracy is at the very roots of the Republic.[60] Times have altered drastically since 1961. *Amicus curiae* respectfully submits that this Court should recognize those changes. At the very least, the choice of means by which the Fourth Amendment is enforced should be returned to the States.[61]

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[59] See generally notes 55-58 *supra* and accompanying text.

[60] See generally, *e.g.,* 2 Tocqueville, *Democracy in America* (Vintage Ed. 1945) at 99-130; Sydnor, *American Revolutionaries In the Making,* (Free Press Ed. 1967) at 107-18. Zuckerman, *Peaceable Kingdoms* (1970).

[61] *Amicus curiae* recognizes that there are some areas of Fourth Amendment law and application in which it has neither experience nor expertise, as in border searches. See, *e.g., Bower* v. *United States,* —— U. S. ——, 95 S. Ct. 2569 (1975); *United States* v. *Ortiz,* —— U. S. ——, 95 S. Ct. 2585 (1975); *United States* v. *Brignonti-Ponce,* —— U. S. ——, 95 S. Ct. 2574 (1975); *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1975). Consequently, *amicus curiae* makes no representation concerning the efficacy of the exclusionary rule in the Federal courts. Thus, its representation and argument is focused on *Mapp* v. *Ohio,* and *amicus* asks only that that case be overruled.

POINT II

If this Court declines to abrogate or modify the exclusionary rule, it should nevertheless hold that such issues are not cognizable as of course in federal habeas corpus proceedings.

Federal habeas corpus has been available to state prisoners on an expansive scale since *Fay* v. *Noia*, 572 U. S. 391 (1963). In *Fay* v. *Noia, supra,* however, this Court explicity minimized the great effect its decision would have on the administration of justice throughout the state and federal systems. Rather, the Court opined that "[t]hose few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Id.* at 440-91. This prophecy has proven to be erroneous.

Historically, the Great Writ was available only to those who were incarcerated unjustly.[62] Recent scholarship has shown that, traditionally, the presence or absence of jurisdiction in the committing court determined "justice" or the lack thereof in any judgment of conviction.[63] Mem-

[62] See, *e.g., Schneckloth* v. *Bustamonte, supra,* 412 U. S. at 256-58 (Powell, J., concurring); *Fay* v. *Noia, supra,* 372 U. S. at 401-02. Compare Pollak, "Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ," 66 *Yale L.J.* 50, 65 (1960) with Reitz, "Federal Habeas Corpus: Post Conviction Remedy for State Prisoners," 108 *U. Pa. L. Rev.* 461, 497 (1960).

[63] Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harv. L. Rev.* 441, 466-75 (1963); Oaks, "Legal History in the High Court—Habeas Corpus," 64 *Mich. L. Rev.* 451, 452 (1966). See, *e.g., Schneckloth* v. *Bustamonte, supra,* 412 U. S. at 253-54 (Powell, J., concurring). Compare *Andrews* v. *Swartz,* 156 U. S. 272 (1895) with *In re Moran,* 203 U. S. 96 (1906) and *Ex parte Watkins,* 28 U. S. (3 Pet.) 193 (1830).

bers of this Court have recently recognized the validity of that scholarship.[64] However, as they also recognize, it is not necessary to limit the writ's availability to jurisdictional cases.[65] As notions of justice have evolved, so too has the role of the writ changed. Nonetheless, the Great Writ's role as an extraordinary remedy, a "High Prerogative Writ",[66] must always be remembered if the modern writ is to have any real meaning.

However, various procedural and substantive requirements have been so relaxed that federal habeas has become but another phase in the general appellate process.[67] Few state criminal judgments are truly final. Relitigation may be endless. Comity has been discarded. Of course, in some situations, a federal collateral remedy is salutary. In search and seizure cases it is not a requisite to justice. Consequently, the Great Writ should not be available to state prisoners who seek release predicated on application of the exclusionary rule.

Admittedly, an extraordinary deprivation of liberty demands an extraordinary remedy. Federal habeas corpus attempts to provide this remedy by issuing where basic

[64] *Schneckloth* v. *Bustamonte, supra,* 372 U. S. at 250 (Powell, J., concurring, with Burger, C. J., and Rehnquist, J.). See *id.* at 249 (Blackmun, J. concurring); *Kaufman* v. *United States,* 394 U. S. 217, 231 (1969) (Black, J., dissenting); *id.* at 249 (Harlan, J., with Stewart, J., dissenting).

[65] *Id.*

[66] 3 *Blackstone, Commentaries* *331.

[67] See, *e.g., State* v. *Funnicello,* 60 N. J. 60, 69, 286 A. 2d 55, 59 (1972). (Weintraub, C. J., concurring) (concerning death penalty, but remarks relevant to *habeas corpus* applicable here).

federal constitutional rights are involved.[68] Further, denial of certain federal rights may well produce incarceration of the innocent.[69] Hence, habeas is quite proper where such rights have been denied, for in such cases justice has been denied. However, the federal habeas petitioner who alleges only that he was incarcerated as a result of an "unreasonable" search or seizure has been deprived neither of justice nor of right.

"Justice" cannot hinge upon the reasonableness of a search or seizure. First, the prisoner is guilty, so his incarceration is just.[70] Second, since the whole concept of "reasonableness" is so ephemeral, no state court's characterization of a search as reasonable could be "unjust". See Point I, *supra*. Of course, it is presumed that motions to suppress are available in state courts and that these motions are decided in good faith. The failure of a state system to provide such a remedy would be a denial of procedural due process. Moreover, the good faith of courts is an inherent assumption in our system of jus-

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[68] See, *e.g.*, *Fay* v. *Noia, supra; Townsend* v. *Sain*, 372 U. S. 293 (1963).

[69] *E.g.*, denial of the right to counsel; denial of the right to trial by a jury of defendant's peers free from prejudice; denial of the right to be tried in the district where the offense was committed; denial of right to trial in atmosphere free of adverse pre-trial publicity; denial of right to speedly trial; denial of right to cross-examination; denial of right to be free from coercion in exercise of privilege against self-incrimination. The foregoing list is, of course, by no means exhaustive.

[70] See, *e.g.*, Amsterdam, "Search and Seizure and Section 2255," 112 *U. Pa. L. Rev.* 378 (1964) (Federal prisoners, but analysis also applicable here). Friendly, "Is Innocence Irrelevant? Collateral Attack On Criminal Judgments" 38 *U. Chi. L. Rev.* 162 (1970).

tice. Consequently, a single federal district court's substitution of its judgment for a state determination insults both comity and the integrity of American justice. Only when this Court speaks may the needs of justice fairly be said to have been clarified. Of course, in Fourth Amendment law, justice may be obtained more easily than clarity. Again, in a pragmatic sense, the state prisoner who claims deprivation of Fourth Amendment rights is guilty. His incarceration is pragmatically just. Therefore, he should not be permitted to raise collaterally that which may well have been determined, or could have been determined, directly. Only if the deprivation becomes one of due process should he be heard. *Cf. Rochin* v. *California, supra.*

Moreover, one who has been incarcerated as the result of an unreasonable search or seizure really has been denied no constitutional right. There is no Fourth Amendment right to exclusion of evidence. See Point 1, *supra.* Again, exclusionary rule issues have no place in federal habeas proceedings. The relationship of the rule to the right is too tenuous to be cognizable under 28 U.S.C. §2254 (a).

Neither right nor justice inhere in habeas cases hinging on the exclusionary rule. The innocence of such petitioners is never in issue. The Great Writ has been perverted. Its function is irrelevant to its nature in such cases. At the very least, habeas petitioners who would challenge their incarceration on search or seizure grounds should be compelled to demonstrate the justice of their claims. They should be required to make a colorable showing of innocence. This, at least, would restore the Great Writ to its role as an instrument of justice. In sum, *amicus curiae* respectfully submits that relief under 28 U.S.C. §2254 (a) should not be granted for unreasonable searches or seizures.

POINT III

Rehabilitation of search warrants issued on less than probable cause is a realistic and balanced approach to cases where the exclusionary rule's purposes have been served by the fact that the officers involved have obtained a warrant prior to the search.

Police officers who, in good faith, have obtained a search warrant have demonstrated that they have been deterred from engaging in arrogant or insolent official conduct. Likewise, the pre-search determination of probable cause by a neutral magistrate clearly meets those criteria required by any concern for judicial integrity which in part produced the exclusionary rule. Consequently, the procedures attendant to obtaining a search warrant have theoretically satisfied the threshold requirements of the exclusionary rule's foundation. Any errors of judgment by the issuing magistrate reflect neither police misconduct nor judicial hypocrisy.

It would therefore seem illogical to contend that considerations derived from the exclusionary rule, or even the rule itself, prohibit rehabilitation of the warrant with additional oral testimony at the motion to suppress. Had the police known that more information was needed to establish probable cause, they undoubtedly would have endeavored to provide the issuing magistrate with that information. Policeman are not lawyers, and they cannot be held to know the legal intricacies of the criteria which define probable cause. See, *e.g., United States* v. *Ventresca, supra.* See also Point I, *supra.* Thus, this Court has held that affidavits in support of a warrant can be further bolstered by oral testimony at the initial issuance hearing. See *Whitely* v. *Warden,* 401 U. S. 560, n. 8 at

565 (1971).[71] If the magistrate errs by failing to elicit that additional data sufficient to demonstrate the existence of probable cause, and then if the magistrate compounds the error by issuing the warrant, the trial judge should have the discretion to rectify the error. However, the correctional process need not be limited to suppression of the evidence. If the officers did in fact have sufficient facts to establish probable cause, but the magistrate did not consider those facts necessary to issue the warrant, then the exclusionary rule's bases would not be offended by oral testimony at the motion to suppress to rehabilitate the warrant.

Consequently, it would follow that the prosecuting authority should be permitted to introduce whatever additional information it had at the time the warrant was issued.[72] If probable cause is then established, there would seem to be no reason proscribing the admission of the evidence. Such an approach would balance the interest of society in convicting the guilty with its current interest in requiring that searches be made only on probable cause.

In effect, this approach would simply deem the issuing magistrates error to be harmless under the circumstances.

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[71] See, *e. g., Aquilar* v. *Texas, supra,* 378 U. S. 109, n. 1; *Campbell* v. *Minnesota,* 487 F. 2d 1 (8 Cir. 1973); *United States ex rel. Gaugler* v. *Brierley,* 477 F. 2d 516 (3 Cir. 1973); *Boyer* v. *Arizona,* 455 F. 2d 804 (9 Cir. 1972); *United States ex rel. Pugach* v. *Mancusi,* 411 F. 2d 177 (2 Cir.) *cert. den.* 396 U. S. 889 (1969); *Naples* v. *Maxwell,* 393 F. 2d 615 (6 Cir. 1965).

[72] Indeed, where defendant asserts perjury or misrepresentation, such examination is necessary. *United States* v. *Marihart,* 492 F. 2d 897 (8 Cir. 1974); *United States* v. *Carmichael,* 489 F. 2d 983 (7 Cir. 1973) (*en banc*); *United States* v. *Danning,* 425 F. 2d 836 (2 Cir. 1969).

Cf. Chapman v. *California,* 386 U. S. 18 (1967). *Amicus curiae* respectfully submits that nothing in the procedural or substantive law of the Fourth Amendment demands more. If any jurisdiction wishes to adopt an alternative approach, for whatever reasons, and to prohibit such rehabilitation, they undoubtedly may. *Cf. e.g. Oregon* v. *Hass,* —— U. S. ——, 95 S. Ct. 1215 (1975).[73] Nonetheless, the requirements of the Fourth Amendment exclusionary rule demand no such result. The matter is simply one of procedure and not of constitutional dimension.[74]

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[73] In New Jersey, the State Appellate Division has recently held that oral testimony may supplement affidavits at the initial hearing. *State* v. *Fariello,* 133 N. J. Super. 114, —— A. 2d —— (App. Div.) *cert. gr.* —— N. J. ——, —— A. 2d —— (1975). See also, *e.g., Commonwealth* v. *Milliken,* 450 Pa. 310, 300 A. 2d 78 (1973); *State* v. *Beal,* 40 Wis. 2d 607, 162 N. W. 2d 64 (1968); *State* v. *Misch,* 23 Ohio Misc. 47, 260 N. E. 2d 841 (C. Pl. 1970).

[74] *Cf. Fed. R. Crim. P.* 41 (c); *Gillespie* v. *United States,* 368 F. 2d 1, 4 (8 Cir. 1966). But see also *United States* v. *Whitlong,* 339 F. 2d 975, 979 (7 Cir. 1964).

CONCLUSION

For the foregoing reasons Amicus Curiae respectfully submits that the Fourth Amendment exclusionary rule should be abrogated or modified, that in the alternative exclusionary rule issues should not be cognizable in federal habeas corpus proceedings or that rehabilitation of search warrants should be permitted.

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